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No. 99-636

Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

YAKAMA INDIAN NATION,
Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent would restate the question presented in petitioner Yakama Indian Nation's petition for writ of certiorari as follows:

> Whether an administrative forfeiture proceeding following a valid seizure of contraband cigarettes violates the Indian Tribe's sovereign immunity where the proceeding is triggered by the Tribe's claim of ownership and right to possession of the contraband cigarettes.

TABLE OF CONTENTS

QUESTION PRESENTED

STATEMENT OF THE CASE.....1

REASONS WHY THE PETITION SHOULD BE DENIED.....4

A. The Department Did Not Initiate An Action Against The Yakama Indian Nation In Violation Of The Tribe's Sovereign Immunity By Offering The Nation An Opportunity To Contest The Seizure In An Administrative Hearing.....5

B. Because the Nation Initiated the Administrative Forfeiture Action, Its Sovereign Immunity is not at Issue And There is No Conflict With College Savings Bank. 9

CONCLUSION.....12

APPENDIX

TABLE OF AUTHORITIES

Cases

Bennis v. Michigan, 516 U.S. 442 (1995) 7

California Franchise Tax Board v. Jackson, 184 F.3d 1046 (9th Cir. 1999) 11

Clark v. Barnard, 108 U.S. 436 (1883) 11

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999) 4, 6, 9

Gardner v. New Jersey, 329 U.S. 565 (1947) 10

Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273 (1906) 11

In re Platter, 140 F.3d 676 (7th Cir. 1998) 11

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 6

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991) 6

One 1958 Plymouth Sedan v. Commonwealth of Pa, 380 U.S. 693 (1965) 6

One Lot Emerald Cut Stones v. U.S., 409 U.S. 232 (1972) 7

People of Porto Rico v. Ramos, 232 U.S. 627 (1914) 11

U.S. v. Bank of New York & Trust Co., 296 U.S. 463 (1936) 9

U.S. v. Gord, 77 F.3d 1192 (9th Cir. 1996) 1, 6, 7

United States v. Baker, 63 F.3d 1478, (9th Cir. 1995) 1, 6

United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) 7

Washington v. Confederated Tribes of Colville Indian Res., 447 U.S. 134 (1980) 5

Statutes

RCW 82.24.135(5) 6

Wash. Rev. Code § 82.01.060 1

Wash. Rev. Code § 82.24.020 1

Wash. Rev. Code § 82.24.030 1

Wash. Rev. Code § 82.24.135 ..... 2, 7

Wash. Rev. Code § 82.24.135(3) 8

Wash. Rev. Code § 82.24.135(5) 8

Wash. Rev. Code § 82.24.250 1

Wash. Rev. Code § 82.24.250(4) 1

Wash. Rev. Code § 82.24.250(6) 1

Rules

Rule 10 Supreme Court 4

Wash. Admin. Code § 458-20-192 1

Regulations

28 U.S.C § 1441(a) 4

28 U.S.C. § 1331 4

28 U.S.C. § 1362 4

STATEMENT OF THE CASE

Washington's Cigarette Excise Tax. The State of Washington imposes a cigarette excise tax on the sale, use, consumption, possession, and distribution of cigarettes in the state. *See* Wash. Rev. Code § 82.24.020 (Pet. App. 43a-44a). The Washington State Department of Revenue (the "Department") is charged with the responsibility for collecting certain excise taxes, including the cigarette excise tax. Wash. Rev. Code § 82.01.060 (Pet. App. 42a). In order to enforce collection of the cigarette tax, the Department has designed and printed stamps to be affixed to the smallest container or package that will be handled, sold, used, consumed, or distributed in Washington, to readily ascertain by inspection whether the cigarette tax has been paid. Wash. Rev. Code § 82.24.030 (Pet. App. 45a).

Wash. Rev. Code § 82.24.250 lists the only persons authorized to possess unstamped cigarettes. They are a wholesaler or retailer, licensed under Washington law; the United States or an agency thereof; and any person including an *Indian tribal organization* that provides the Department with notice it is bringing or causing to be brought into the state unstamped cigarettes. (Pet. App. 51a-53a). Under Washington law, all deliveries of unstamped cigarettes to Indian reservations in Washington must be preapproved by the Department. *United States v. Baker*, 63 F.3d 1478, 1483 (9th Cir. 1995); *U.S. v. Gord*, 77 F.3d 1192 (9th Cir. 1996); Wash. Admin. Code § 458-20-192 (App. 1a). Preapproval is obtained by giving advance notice to the Department. In the absence of such notice, any unstamped cigarettes are considered contraband and are subject to seizure and sale. *See* Wash. Rev. Code §§ 82.24.250(4),(6) (Pet. App. 51a-53a); *Baker*, 63 F.3d at 1489.

The Seizure of Contraband Cigarettes. At approximately 3:45 a.m. on January 16, 1997, a Washington State Patrol trooper observed a black Peterbuilt truck with trailer cross the scales at a weigh station in Plymouth, Washington, at the Washington-Oregon border. 176 F.3d at 1244; (Pet. App.

3a). The trooper requested the driver of the vehicle to produce all permits, registration, and licensing documents, along with his bill of lading. *Id.*

The driver produced a bill of lading indicating that he was carrying a load of cigarettes apparently owned by and en route to the Yakama Indian Nation at Toppenish, Washington. *Id.* While checking the load of the truck, the state trooper noticed individual cigarette packages that did not bear Washington State tax stamps. *Id.* The trooper contacted the Department to ascertain whether the Department had received advance notice of the shipment of unstamped cigarettes to the Nation. The Department had not. *Id.* Upon proper application to the Benton County Superior Court, the Department secured a search warrant to search the trailer for contraband cigarettes. *Id.* Later that day, the Department searched the trailer, seized the contraband cigarettes, and stored them in a warehouse in Pasco, Washington. *Id.*

The Nation's Claim of Ownership. On January 17, 1997, the Department notified the shipper by letter that the cigarettes had been seized as contraband under Washington law (Pet. App. 55a-56a). The Department enclosed a notice of seizure and sale of contraband goods and an inventory of confiscated cigarettes (Pet. App. 58a-60a). The letter put the shipper on notice that it had 15 days to file a written claim of ownership or right to possession of the cigarettes seized. Because the bill of lading indicated a destination of Toppenish, Washington and identified the purchasers as several Yakama Indian Nation accounts, the Department sent a courtesy copy of the notice of seizure and sale of contraband goods and instructions on how to file a written claim to the chair of the Yakama Tribal Council (Pet. App. 57a-60a). The Nation sent a letter to the Department, claiming ownership of the seized cigarettes and demanding their immediate return. 176 F.3d at 1244; (Pet. App. 3a). Pursuant to Wash. Rev. Code § 82.24.135, the Department then sent the Nation notice of an administrative forfeiture hearing, in which the Nation could challenge the

seizure and to assert its claim to the cigarettes. 176 P.3d at 1244; (Pet. App. 3a-4a).

Proceedings in the District Court. Instead of participating in the hearing, the Nation filed a complaint against the Department in the Federal District Court for the Eastern District of Washington seeking return of the cigarettes and declaratory and injunctive relief. 176 P.3d at 1244; (Pet. App. 4a). At the same time, the Nation sought to remove the administrative hearing to the district court pursuant to 28 U.S.C. § 1441. 176 F.3d at 1245; (Pet App. 4a). Due to the perishable nature of the cigarettes, the Department sold the cigarettes at auction for $235,000. *Id.* Because the cigarettes were sold to a licensed cigarette wholesaler, no taxes were collected upon the sale of the cigarettes. The district court ordered the gross proceeds from the auction to be paid into the registry of the court. *Id.*

The Nation moved to dismiss the removed forfeiture proceeding, arguing that the Department could not exercise jurisdiction over a sovereign nation or its property. *Id.* The Nation also sought leave to amend its original action against the Department to include ultra vires claims against the individual state officer involved in the seizure and those individuals responsible for enforcement of the statute. *Id.* The Department moved to dismiss the Nation's complaint under the Eleventh Amendment and to remand the removed administrative proceeding to the Department for hearing on the Nation's claim to the cigarette proceeds. 176 F.3d at 1245; (Pet. App. 4a-5a).

The district court granted both of the Department's motions, denied the Nation's motions, and ordered disbursement of the auction proceeds to the Department. 176 F.3d at 1245; (Pet. App. 5a). The district court determined that the Eleventh Amendment barred the Nation's action against the Department for declaratory and injunctive relief and for return of the cigarette proceeds. Pet. App. 5a-6a. The district court also determined that it did not have jurisdiction to hear the removed administrative forfeiture proceeding because the proceeding was

not a state court action under 28 U.S.C § 1441(a), and because the proceeding did not implicate a federal question under 28 U.S.C. § 1331 or § 1362, respectively. (Pet. App. 21a-23a). The district court later denied the Nation's motion for reconsideration, but stayed disbursement of the auction proceeds to preserve the status quo pending appeal. 176 F.3d at 1245; (Pet. App. 5a).

The Ninth Circuit Decision. The Nation appealed to the Ninth Circuit Court of Appeals. The Court of Appeals affirmed the district court order denying the Nation leave to amend its complaint to add individual state officers as defendants, and in doing so the court reached the merits of the sovereign immunity issue. 176 P.3d at 1245-1248; (Pet. App. 6a-12a). The Court of Appeals concluded that application of the State's forfeiture process to the Nation and its property did not violate tribal sovereign immunity because it was the Nation's claim of ownership and demand for return of the seized cigarettes that initiated the administrative hearing. 176 P.3d at 1247-1248; (Pet. App. 11a). Accordingly, the Ninth Circuit held that the Nation's sovereign immunity was not implicated, that the Nation had no federal right requiring vindication in a federal court, and that it would, therefore, be futile to allow the Nation to amend its complaint to add individual state officers as defendants. 176 P.3d at 1247-1248; (Pet. App. 11a-12a).

REASONS WHY THE PETITION SHOULD BE DENIED

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." Respondent, submits that the Ninth Circuit Court of Appeal's decision here is not in conflict with this Court's recent decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999) and there are no other compelling reasons to grant the Yakama Indian Nation's Petition.

A. The Department Did Not Initiate An Action Against The Yakama Indian Nation In Violation Of The Tribe's Sovereign Immunity By Offering The Nation An Opportunity To Contest The Seizure In An Administrative Hearing.

While the Nation enjoys sovereign immunity from suit by the States, sovereign immunity does not allow the Nation to ignore the valid tax laws of the States with impunity. In *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134 (1980), this Court addressed the State of Washington's cigarette tax enforcement practices and concluded that the State could seize off-reservation unstamped cigarettes. This Court so concluded by determining that tribal rights to independence must be balanced against the needs of the States to enforce their tax laws, and that off-reservation seizures constitute a minimal burden on tribes when a tribe has refused to comply with valid state tax obligations. *Id.* at 161-62.

Here, the Nation does not contend that Washington's requirement that tribes first notify the Department and get its approval before transporting unstamped cigarettes into Washington is not a valid tax regulation. Nor does the Nation challenge the State's seizure of cigarettes in this case. Pet. at 11 n.6.[1] Instead, the Nation argues that the State cannot forfeit the

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[1]While the Nation does not contest the State's seizure in this case, it nevertheless questions the Ninth Circuit's determination that the State may lawfully seize truckloads of unstamped cigarettes owned by a tribe when the cigarettes are en route to the reservation. This Court has previously approved of off-reservation seizure of unstamped cigarettes regardless of who owns them at the time. In *Colville* (in which the Yakama Indian Nation was a party), this Court recognized that the burden of seizure would fall on Indian tribes, not non-Indian tribal cigarette suppliers. In finding that Washington's interest in enforcing its valid taxes was sufficient to justify these seizures, this Court stated: "Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed. . . By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." 447 U.S. at 161-62. This Court expressed

cigarettes without conducting an adjudicative hearing, and under *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), such a hearing cannot be conducted if the property owner enjoys sovereign immunity and has not consented to suit. The argument has no merit. A forfeiture hearing is required only if a person steps forward and claims ownership of the cigarettes or right to possession of them. RCW 82.24.135(5). (Pet. App. 49a). That is what happened in this case. Where the Nation has affirmatively requested an administrative hearing before the Department to contest the seizure of its cigarettes, the Nation's sovereign immunity is never implicated.

Despite the Nation's arguments to the contrary, the Department has not initiated suit against the Nation and thereby violated its sovereign immunity merely by providing the Nation an opportunity to contest the seizure of its cigarettes. Once an Indian tribe has violated a reasonable state tax regulation, and the State has seized non-complying cigarettes off the reservation, the cigarettes are contraband.[2] *See United States v. Baker*, 63 F.3d

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no opinion on whether the State could enter onto the reservation to seize stocks of cigarettes which are intended for sale to nonmembers and sell these stocks in order to obtain payment of the taxes due. *Id.* at 162.

In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991), this Court held that the doctrine of sovereign immunity prevented the Oklahoma Tax Commission from enforcing its assessment for back taxes by direct suit against the Tribe. Citing *Colville* and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), however, this Court determined that States may collect the sales tax either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supply unstamped cigarettes to the tribal store. Neither remedy infringed upon tribal sovereignty. *See also U.S. v. Gord*, 77 F.3d 1192 (1996)(under Washington law, all unstamped unapproved cigarettes are "subject to seizure[,] ... tax and penalties," even if possessed by and distributed to Native Americans.

[2]Cigarettes that do not bear tax stamps are contraband per se unless possessed by a licensed Washington wholesaler, or a person (including an Indian tribe) who has given advance notice of the shipment to the State and has received its approval. Wash. Rev. Code §§ 82.24.130(3), 82.24.250, and 82.24.260. The Nation's reliance on *One 1958 Plymouth Sedan v. Commonwealth of Pa*, 380 U.S. 693 (1965), in support of its claim for return

1478, 1488 (9th Cir. 1995); *U.S. v. Gord*, 77 F.3d 1192 (1996). The state is then entitled to process the offending cigarettes as contraband, subject to compliance with the ordinary demands of due process.[3]

Wash. Rev. Code § 82.24.135 lists the procedures the Department must undertake in all cigarette seizures. Wash. Rev. Code § 82.24.135(5) requires the Department to afford any person who notifies the Department, in writing, of the person's claim of ownership or right to possession a reasonable opportunity to be heard as to their claim or right. The statute does not mandate a hearing be held to complete the forfeiture process, only that a person claiming ownership or right to possession of the cigarettes seized be given an opportunity to be heard if that person so desires. The triggering mechanism is the person's written claim or right to possession of the seized items.

An administrative forfeiture proceeding, unlike a state court action, is not initiated by a complaint. Instead, notice is sent within five days following the seizure to all persons having

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of the cigarette proceeds is misplaced. In *1958 Plymouth*, the seized item at issue was an automobile used to transport intoxicating liquors. Under Pennsylvania law, automobiles used to transport intoxicating liquor not bearing Pennsylvania tax seals could be forfeited after a hearing. Because the State of Pennsylvania could not admit the liquor into evidence due to Fourth Amendment violations, this Court held that the proceeding to forfeit the automobile could not stand alone because the automobile could only be forfeited after a determination that the automobile was in fact transporting contraband. The intoxicating liquor, however, was contraband since it did not bear Pennsylvania tax seals. See *also United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984)(an unlicensed firearm dealer's acquittal on criminal charges does not preclude forfeiture proceedings against those firearms); *One Lot Emerald Cut Stones v. U.S.*, 409 U.S. 232 (1972)(a forfeiture of imported merchandise not declared to United States Customs upheld despite owner's acquittal on smuggling charges). Similarly, the unstamped cigarettes here are contraband since the Nation did not first notify the Department and get its permission before transporting the unstamped cigarettes into Washington.

[3]The Nation does not complain that Washington's forfeiture scheme violates due process. Nor could the Nation successfully make such an argument. *See, e.g., Bennis v. Michigan*, 516 U.S. 442 (1995).

any known right or interest therein, of the seizure and intended forfeiture of the seized property. Wash. Rev. Code § 82.24.135(3). If no person notifies the Department in writing of the person's claim or right to possession of the items seized within fifteen days of the date of the notice of seizure, the item seized is considered forfeited. Wash. Rev. Code § 82.24.135(4). If any person notifies the Department in writing of that person's claim of ownership or right to possession of the items seized, the person or persons shall be afforded a reasonable opportunity to be heard as to their claim or right. Wash. Rev. Code § 82.24.135(5).

If any person claiming ownership or right to possession of the items seized does not want to have its claim decided in an administrative setting and the aggregate value of the items seized is more than five hundred dollars, that person can bring an action for return of the seized items in the superior court of the county in which the property was seized. Wash. Rev. Code § 82.24.135(5).

On January 20, 1997, the Nation notified the Department of its claim of ownership (thereby challenging the Department's authority to seize and sell the cigarettes) and demanded the return of the cigarettes. 176 F.3d at 1244; (Pet. App. 3a). The Nation's claim of ownership or right to possession of the seized cigarettes is what triggered the forfeiture hearing. The Nation incorrectly interpreted the Department's willingness to conduct a hearing as an action against the Nation instead of an action initiated by the Nation. Whether an administrative forfeiture hearing or a superior court proceeding is actually held, however, is up to the Nation. The Nation is always free to forgo the administrative forfeiture hearing by withdrawing its demand for return of the cigarette proceeds.

B. Because the Nation Initiated the Administrative Forfeiture Action, Its Sovereign Immunity is not at Issue And There is No Conflict With College Savings Bank.

In *College Savings Bank*, a bank that sold deposit contracts for funding college education brought an action in federal district court against the Florida Prepaid Postsecondary Education Expense Board (which sold similar products), alleging unfair competition under the Lanham Act based on the Board's alleged false advertising. This Court was faced with the question whether provisions of the Lanham Act were effective to permit suit against a State for its alleged misrepresentation of its own product--either because the Act effects a constitutionally permissible abrogation of state sovereign immunity, or because the Act operated as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Act. This Court sided with Florida that its sovereign immunity was neither validly abrogated nor voluntarily waived. This Court concluded that there is "no place" for the doctrine of constructive waiver in sovereign immunity jurisprudence. *Id.* at 2227.

College Savings Bank is easily distinguishable from the present case. There a bank brought an action against the State of Florida. Florida was a defendant. Here the Nation initiated the administrative forfeiture proceeding by claiming its right to possession of the cigarettes. The Nation is the plaintiff. Bringing an action as a plaintiff simply does not implicate the plaintiff's sovereign immunity.

In *U.S. v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), the United States, claiming to be the owner by assignment of certain funds which originally had belonged to three Russian insurance companies, brought suits for accounting and delivery in federal district court. The defendants held the funds in question under orders and judgments of a state court, in connection with the liquidation of the companies. The United States by motion in the district court sought to enjoin distribution

of the funds and to require payment of them to it. This Court, affirming dismissal of the complaints and denial of the injunction, held that the state court obtained jurisdiction over the funds, and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which should be resolved in that court. This Court further held that there was "no merit" in the suggestion "that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant--being sued without its consent." In intervening to present its claim, "the United States would be an actor--voluntarily asserting what it deemed to be its rights--and not a defendant." There would be no impairment "of any rights the government may possess, or any sacrifice of its proper dignity as a sovereign," if it prosecuted its claim in the appropriate state forum where the funds were held. 296 U.S. at 480-81. Sovereign immunity is simply not implicated in such a procedure.

In certain instances, a sovereign is faced with the choice of defending its right, claim or interest in property in a foreign forum or not at all. This is particularly so when the foreign forum has possession or control of the res. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), a railroad filed its petition for reorganization shortly after receiving notice from the Attorney General of New Jersey that he would apply to a state court for summary judgment for unpaid taxes of the railroad and seek to sell its property in satisfaction of the judgment. The State of New Jersey filed a proof of claim for unpaid taxes in the railroad's bankruptcy proceeding. The railroad filed objections to the State's claim and the State, through its Attorney General, filed replies to the objections.

The trustee filed with the reorganization court a petition for adjudication of New Jersey's tax claim. The State argued that entertaining the petition would constitute a prohibited suit against the State. Rejecting that argument, this Court held that the reorganization court had jurisdiction over the proof and allowance of the tax claims, and that the exercise of that power

was not a suit against the State. This Court explained that it is traditional bankruptcy law that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the consequences of that procedure." 329 U.S. at 573. If the claimant is a State, the procedure of proof and allowance "is not transmitted into a suit against the State because the court entertains objections to the claim." *Id.* "When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim." 329 U.S. at 574. *See also Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284-289 (1906).[4]

Because the Nation is not a "defendant" in the administrative forfeiture proceeding (the same role the Nation would have if it chose to challenge the seizure in state court), the Nation's sovereign immunity is not implicated.

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[4]Similar waivers of sovereign immunity have been found in many contexts. *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914)(Porto Rico voluntarily petitioned to be made a party, asserting rights to the property in controversy in ejectment action brought by defendant, a citizen of Porto Rico, against a subject of Great Britain); *In re Platter*, 140 F.3d 676 (7th Cir. 1998)(inasmuch as state voluntarily chooses to enter bankruptcy case when it initiates adversary proceeding, state removes itself from Eleventh Amendment protection by starting one); *California Franchise Tax Board v. Jackson*, 184 F.3d 1046 (9th Cir. 1999)(State taxing authority waived its Eleventh Amendment sovereign immunity with regard to bankruptcy court's determination that debtor's tax liability debts were dischargeable, pursuant to debtors' objection, when authority filed proof of claim for unpaid state income taxes.

CONCLUSION

For the above mentioned reasons, the Ninth Circuit's decision does not conflict with this Court's subsequent decision in *College Savings Bank* and the Nation's petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

REVISED CODE OF WASHINGTON (RCW)

82.24.080 Legislative intent--Taxable event--Tax liability. (1) It is the intent and purpose of this chapter to levy a tax on all of the articles taxed under this chapter, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles taxed under this chapter is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

(2) It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by subsection (1) of this section but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. A precollection obligation may not be imposed upon a person exempt from the tax who sells, distributes, or transfers possession of cigarettes to another person who, by law, is exempt from the tax imposed by this chapter or upon whom the obligation for collection of the tax may not be imposed. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

(3) In the event of an increase in the rate of the tax imposed under this chapter, it is the intent of the legislature that the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed articles after the effective date of the rate increase shall be liable for the additional tax, or its precollection obligation as required by this chapter, represented by the rate increase. The failure to pay the additional tax with respect to the first taxable event after the effective date of a rate increase shall not prevent tax liability for the additional tax from arising from a subsequent taxable event.

WASHINGTON ADMINISTRATIVE CODE (WAC)

458-20-192 Indians--Indian reservations. Definitions

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order and which are areas currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispell, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means a person duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

Note: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the state of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

. . . .

Cigarette Tax

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery or sale and delivery by any person of unstamped cigarettes to Indians or tribal vendors for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department of revenue. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the vendor. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the vendor's place of business, records indicating the percentage of such trade that has historically been realized by the vendor, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of unstamped cigarettes to any reservation or to any Indian or tribal vendor thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently

completed calendar or fiscal year by the Tobacco Tax Institute, multiplied by the resident enrolled membership of the affected tribe. Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal vendor without advance approval by the department will result in the treatment of those cigarettes as contraband and subject to seizure and in addition the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. Approval for sale or delivery to Indian or tribal vendors of unstamped cigarettes will be denied where the department finds that such Indian or tribal vendors are or have been making sales in violation of this rule.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.

Revised November 14, 1980.

REPLY

BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

California Franchise Tax Bd. v. Jackson, 184 F.3d 1046 (9th Cir. 1999) 7

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) 4, 5, 8

Franchise Tax Bd. of California v. United States Postal Serv., 467 U.S. 512 (1984) 2

Gardner v. New Jersey, 329 U.S. 565 (1947) 6

Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273 (1906) 7

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 3

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) 2, 4

Porto Rico v. Ramos, 232 U.S. 627 (1914) 7

Schlossberg v. Comptroller of Treasury, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998) 6

Shaffer v. Heitner, 433 U.S. 186 (1977) 3

United States v. Bank of New York & Trust Co., 296 U.S. 463 (1936) 7

STATUTES

28 U.S.C. § 41 (1999) 7

Wash. Rev. Code § 82.24.135(1) 1

REPLY BRIEF FOR THE PETITIONER

Respondent Washington Department of Revenue offers one – and only one – reason why a writ of certiorari should be denied. The Tribe's sovereign immunity, we are told, is not implicated because respondent did not initiate an action against the Tribe or its property. Brief in Opposition ("Br. Opp.") 5, 6, 8, 9, 11.

This is both false and irrelevant. Both of the courts below found precisely the opposite, and respondent itself has already formally admitted precisely the opposite. The Ninth Circuit stated that the Tribe was subjected to "an administrative forfeiture proceeding *that the Department instituted* after it seized the cigarettes." Appendix to Petition for a writ of certiorari ("App.") 2a (emphasis added). The district court characterized this forfeiture proceeding as *"an action brought by a state against a piece of property."* App. 23a (emphasis added).

The Washington statute on cigarette tax seizures provides that a proceeding on "[f]orfeiture shall be deemed to have commenced by the seizure." Wash. Rev. Code § 82.24.135(1) (App. 47a). After the seizure, respondent, in its own words, sent a "notice of seizure and sale of contraband goods" to the Tribe. Br. Opp. 2. The Tribe, according to respondent, did not file a writ, complaint or pleading, but merely sent a letter to respondent that "demanded" – not a proceeding – but only "the return of the cigarettes." Br. Opp. 8; *see also* Br. Opp. 2 (same). Respondent, in its own words, "sent the Nation notice of an administrative forfeiture hearing." Br. Opp. 2. Respondent characterizes its own "notice of seizure and sale" and "notice of an administrative forfeiture hearing" not

as formal notices with established legal consequences, but as mere "courtesy cop[ies]." Br. Opp. 2. But as we have already explained, Petition for a writ of certiorari ("Pet.") 9, and respondent does not dispute, sovereign immunity " 'embrace[s] all civil process incident to the commencement or continuance of legal proceedings,' " *Franchise Tax Bd. of California v. United States Postal Serv.*, 467 U.S. 512, 518 (1984) (citation omitted), including seizures and attachments and tax assessments. *Id.* at 522-23.[1]

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[1] Respondent asserts that the courts have sustained its right to seize unstamped cigarettes directly from sovereign Indian tribes. Br. Opp. 5 & n.1. But respondent's only authorities are cases that we have already distinguished. *See* Pet. 11 n.6. Those cases involved seizures *not* from sovereign Indian tribes, but rather from (a) non-sovereign out-of-state wholesalers, or (b) non-sovereign individuals involved in interstate cigarette smuggling. Furthermore, those cases expressly noted (and reserved) the distinct questions involved in the seizure of property from a sovereign tribe.

In any event, none of those cases involved the question presented here, which is not whether a state may seize cigarettes it suspects are unstamped contraband, but whether a state may subject a sovereign tribe to the forfeiture proceeding that is necessary before the state can declare the property forfeited and take title to it. Respondent concedes that its forfeiture process is "subject to compliance with the ordinary demands of due process," and that respondent therefore cannot forfeit the Tribe's property without instituting a forfeiture hearing to adjudicate whether, in fact, the cigarettes are contraband. Br. Opp. 7. Therefore, just as in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), a state must seek alternative means to enforce its cigarette tax regime that do not violate tribal immunity. *See* Pet. 12-14.

Moreover, respondent itself has already *formally admitted* the obvious: that it instituted forfeiture proceedings against the Tribe's property. Paragraph V of the Complaint averred that respondent "notified plaintiff that a state adjudicative proceeding was being instituted before an Administrative Tribunal of the Department of Revenue." App. 36a. Respondent's Answer formally admitted that allegation. App. 38a (¶ V.). In the district court, before it adopted its current strategy of factual revisionism, respondent itself characterized its forfeiture proceeding as an "*in rem* action" brought by the State against the Tribe's property. Response Brief of Washington Department of Revenue in the Ninth Circuit at 11, 32.[2]

Even if respondent had its facts straight, its preoccupation with which party filed the first legal shot simply misses the point. Questions of sovereign immunity do not turn on the "empty formalism," *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997), of how a state chooses to label the parties in its adjudicative proceedings. The vital interests that are served by sovereign immunity "are not to be sacrificed to elementary mechanics of captions and

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[2] The outdated *in rem* fiction does not make the State's action against the Tribe any less a violation of sovereign immunity. " 'All proceedings, like all rights, are really against persons.' " *Shaffer v. Heitner*, 433 U.S. 186, 207 n.22 (1977) (citation omitted). " '[J]urisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Id.* at 207 (citation omitted). Thus, the "fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." *Id.* at 212.

pleading." *Id.* Thus, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), this Court unanimously held that a compulsory counterclaim against a tribe by a state tax agency to collect unpaid cigarette taxes was barred by tribal immunity, even though the tribe was the plaintiff that had sued the Tax Commission in the first place. If sovereign immunity were the facile word-game that respondent supposes, a state could always evade immunity by engaging in this form of self-help, seizing a tribe's property, and then making the tribe petition for a hearing to review the legality of the seizure.

In the end it is irrelevant whether the state denominates itself the plaintiff or the defendant in a forfeiture proceeding, because it is undisputed that the state cannot constitutionally forfeit property without an adjudicative hearing to determine whether the property is indeed contraband subject to confiscation, and such a hearing cannot be conducted if the property owner enjoys sovereign immunity. To be sure, the state can schedule a hearing and declare the sovereign party in default if it fails to participate, but default is only binding if the party has been properly *summoned*, and a summons, of course, is precisely the sort of coercive legal instrument from which a sovereign is immune.

Respondent offers one, and only one, distinction between this case and *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999): "Florida was a defendant. Here the Nation initiated the administrative forfeiture proceeding . . . . " Br. Opp. 9. As demonstrated above, this is simply untrue, and therefore

respondent has provided no basis whatsoever for denying a writ of certiorari. Respondent agrees that *College Savings Bank* bars coercive waivers of sovereign immunity, Br. Opp. 9, and does not question the applicability of that doctrine to tribal sovereigns. Instead, respondent argues only that the Tribe's participation in the State's forfeiture proceeding is voluntary, not coerced, because the Tribe remains free to default, "to forgo the administrative forfeiture hearing" by abandoning the seized property, and thereby to preserve its tribal sovereign immunity. Br. Opp. 8.

But that is precisely *our* point. Respondent simply does not grasp that the forbidden coercion here is granting the Tribe due process and the opportunity to regain its seized property only at the price of surrendering its sovereign immunity. Respondent claims the right to seize tribal property and to keep that property unless the Tribe agrees to waive its sovereign immunity and participate in a forfeiture hearing to determine if the property is indeed contraband subject to state confiscation. Respondent is effectively telling the Tribe, "You may preserve your sovereign immunity, but only at the price of the property we've just seized" – and here that price is $235,000 (the auction price of the seized cigarettes).

With admirable candor, respondent admits that its statutory procedure is to hijack tribal property from a truck on the highway and then to hold it hostage to coerce the Tribe to submit to the State's adjudicatory process. Indeed, respondent does not even attempt to soften its admission by arguing that its ability to enforce state revenue laws would be impaired if it were denied

the power to seize and forfeit suspected contraband cigarettes directly from Indian tribes themselves. Nor could it. As we pointed out in the Petition at 17 & n.13, this Court has recognized that there are adequate enforcement alternatives available to the states that do not involve direct legal action against a sovereign tribe, and respondent does not contend otherwise.

The cases cited by respondent are entirely consistent with the principle that sovereign immunity may not be abrogated in the guise of a coerced waiver. Respondent has failed to identify any authority that supports its contention that one sovereign may seize the property of another sovereign and then condition recovery of the property on submission to its jurisdiction. Rather, the cases cited by respondent involve instances in which a third party and a sovereign claim an interest in the same piece of property and another sovereign opens its courts to permit adjudication of the disputed property right. None of these cases involved even a hint of the sort of administrative extortion committed by respondent here.

In each of the bankruptcy cases cited by respondent, the property at issue was held by a third party, and the sovereign whose courts had jurisdiction made no claim to the property. *See, e.g., Gardner v. New Jersey*, 329 U.S. 565 (1947). Nevertheless, there is a split among the circuits on whether even the implied waiver of sovereign immunity found in the bankruptcy cases remains good law in light of this Court's recent Eleventh Amendment decisions. *Compare Schlossberg v. Comptroller of Treasury*, 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998) (holding the waiver of sovereign immunity contained in Section 106 of the Bankruptcy Improvement Act

of 1994 to be violative of the Eleventh Amendment) *with California Franchise Tax Bd. v. Jackson*, 184 F.3d 1046, 1049-50 (9th Cir. 1999) (finding that the rationale of *Gardner* survives recent Supreme Court precedent and that Section 106 does not violate the Eleventh Amendment). To the extent these bankruptcy cases have any relevance to the instant case, this split among the circuits underscores the need for this Court to provide guidance to the lower courts on the important principles of sovereign immunity at issue in this case or, at the very least, to ensure that the courts of appeals consider this Court's recent decisions.[3]

The Court's decision in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936) is distinguishable for precisely the same reason: the state whose courts exercised jurisdiction over the property in question made no claim to those assets and thus no coercion was present. Moreover, the sole issue before the Court in *Bank of New York* was whether 28 U.S.C. § 41 conferred exclusive jurisdiction upon federal district courts in suits brought by the United States, and thus the case has no bearing on the issue presented here.

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[3] Respondent's reliance upon *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273 (1906), is misplaced as the State of South Carolina there was a defendant that was deemed to have waived its sovereign immunity by its appearance in federal court. There is no suggestion that this waiver had been coerced in any manner. Likewise, in *Porto Rico v. Ramos*, 232 U.S. 627 (1914), Puerto Rico's waiver of sovereign immunity was not coerced. Puerto Rico held the property at issue in that case and moved to intervene as a defendant to better protect its property interest. As these cases did not implicate coerced waivers, they simply have no bearing on the present controversy.

CONCLUSION

The Ninth Circuit's endorsement of coercive waivers of sovereign immunity cannot be reconciled with this Court's recent decision in *College Savings Bank*. If the decision below is allowed to stand, no sovereign within our federal system, whether tribe or state, will be safe from extortionate constructive waivers of immunity at the hands of authorities able to seize that sovereign's property. Therefore, the petition should be granted, the judgment of the Court of Appeals vacated, and the case remanded for reconsideration in light of *College Savings Bank*. Alternatively, the petition should be granted and the case set for plenary review.

Respectfully submitted,

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